No. 09-561

Supreme Court, U.S.
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In The
Supreme Court of the United States

ROSS PARKHURST and AMY PARKHURST,
individually and as guardians and next friends of H.P.,
A minor child under the age of eighteen,

Petitioners,

v.

STEPHEN TABOR, DANIEL SHUE,
and COUNTY OF SEBASTIAN,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Petitioners have standing to bring an equal protection suit against the Respondents, two state prosecutors and an Arkansas County, for their failure or refusal to prosecute the alleged perpetrator of a crime against the Petitioners' ward?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Sebastian County, Arkansas, respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. §1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any ... person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

* * *

U.S. Const. amend. XIV provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On June 27, 2007, Petitioners Ross and Amy Parkhurst, Plaintiffs below individually and as next friends of a minor referred to as "H.P.," filed suit in the United States District Court for the Western District of Arkansas, under 42 U.S.C. §1983, alleging, *inter alia*, that Sebastian County, Arkansas and state prosecuting attorneys Stephen Tabor and Daniel Shue violated the Plaintiff's equal protection rights by *not* prosecuting H.P.'s alleged molester, Chad Belt.[1] Shortly after the filing of the Petioner's Complaint in the District Court, Sebastian County and state prosecutors Tabor and Shue separately moved to dismiss the case, primarily on the basis that the Plaintiffs lacked standing to challenge Mr. Belt's non-prosecution and on the prosecutors' invocation of prosecutorial immunity. After the Petitioners responded, the District Court granted the Respondents' separate motions to dismiss and issued an Opinion and Judgment dismissing Plaintiffs' Constitutional claims with prejudice. App. B & C to Petition for Writ of Certiorari, pp. 15a-34a. The Petitioners thereafter

[1] The Petitioners also sued Chad Belt directly, alleging that he molested H.P. Those claims were eventually tried to a jury, resulting in a verdict in Petitioners' favor. That verdict is not the subject of this appeal.

appealed to the Eighth Circuit Court of Appeals, which affirmed the holding of the District Court and issued a Judgment in the Respondents' favor. App. A to Petition for Writ of Certiorari, pp. 1a-14a. The Petitioners now seek review of the Judgment of the Court of Appeals by a Writ of Certiorari.

Since this appeal arises from the District Court's grant of the Respondents' respective motions to dismiss, and the Court of Appeals' affirmation of that holding, the facts relevant to this appeal are almost entirely those facts pleaded by the Petitioners in their Complaint (*see* Petitioners' Appendix, pp. 3a-7a, 20a-23a), with one exception. The Petitioners' allegation that "H.P.," a minor, was the victim of molestation by Separate Defendant Chad Belt (the principal basis for her argument that she belongs in a class of incest victims), is not entitled to the same deference as the remainder of her allegations, even at this early procedural stage (i.e., on motions to dismiss). In short, while a plaintiff's allegations are normally accepted as true by the Court on a motion to dismiss, such allegations should not be accepted when, as here, they baldly contradict what is perhaps the strongest presumption in American law. As the Petitioners admit, Separate Defendant Belt was never prosecuted, much less convicted and, accordingly, is entitled to the presumption of innocence. Of course, this would be important in an analytical sense in this case as the Petitioners would be unable to establish that they even belong to the class of victims they seek to represent and would therefore be unable

to cross the initial threshold of an equal protection claim.

For the reasons set forth below, the Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

REASONS FOR DENYING THE PETITION

In spite of the Petitioners' attempts to shift the focus of the inquiry, the sole, dispositive question in this case is whether the Petitioners have standing to assert an equal protection claim against the Respondents, two state prosecutors and an Arkansas County, for their failure or refusal to prosecute the alleged assailant of their ward, a minor child referred to in this action as "H.P." Ultimately, for a number of reasons, this question has always been and must always be answered in the negative. Because no other court, including this Court, has ever ruled differently, Certiorari is improper and the Petition should be denied.

The Petitioners' sole claim against the Respondents, Sebastian County, Arkansas, Stephen Tabor, and Daniel Shue (Tabor and Shue were prosecuting attorneys in Sebastian County) is that the Constitutional rights of a minor, referred to as "H.P.," have been violated because the Respondents did not prosecute H.P.'s alleged molester for his alleged sexual assault(s) on H.P. The District Court held that the

Petitioners lacked standing to bring an equal protection claim against the Respondents and the Eighth Circuit Court of Appeals affirmed.

The Petitioners' allegation(s) that the Respondents' non-prosecution of H.P.'s alleged molester fails as a matter of law because the Petitioners lack standing to contest the prosecution or non-prosecution of a third party. Standing is a doctrine meant to reinforce the case or controversy requirement, which in turn effectuates the appropriate separation of powers in our democratic society. The standing doctrine requires, *inter alia*, that a civil plaintiff must show "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The District Court correctly held, and the Court of Appeals affirmed, that the Petitioners could not make a showing of personal injury in this case because they have no judicially cognizable interest in the prosecution or non-prosecution of H.P.'s alleged assailant. Since no holding of this Court or of the various Courts of Appeals has ever reached a different conclusion, the Petition for a Writ of Certiorari is improper and should be denied.

I. The Court of Appeals' holding that the Petitioners had no standing to pursue an equal protection claim against the Respondents is not contrary to the precedents of this Court and does not create a circuit split because no case has ever held that the prosecution or non-prosecution of an individual constitutes the "treatment" of any third party under the Equal Protection Clause.

One of the most important practical problems that would be created if the Petitioners' arguments were accepted in this case (i.e., if "alleged" crime victims were allowed to sue prosecutors under the equal protection clause for the prosecution or non-prosecution of a third party) would be the torrent of litigation that would inevitably follow. Common sense dictates that someone would object (just as someone else would applaud) virtually every time the decision was made not to prosecute a purported offender. In light of the emotion and personal nature of criminal justice, the objecting party would almost certainly seek justice in the civil courts (if permitted). As such, if the Petitioners' arguments really were founded on the bedrock of established law, as they claim, the string of cases in exactly the same procedural posture would no doubt go on for pages. Yet, in the most glaring omission in their briefing (both here and in the Courts below), the Petitioners fail to offer a single citation to a procedurally identical case, instead relying on comparative analogies and unfounded analytical leaps. The Petitioners' dearth of case law

support (no procedurally identical cases) results from the simple fact that Petitioners' theory is entirely novel. In the end, Petitioners' equal protection claim(s) fail because no case has ever held that the non-prosecution of a third party constitutes the "treatment," equal or otherwise, of any third party, including the alleged[2] victim, under the equal protection clause.

The Equal Protection Clause generally requires the government to treat similarly situated people alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Dissimilar treatment of dissimilarly situated persons does not violate equal protection. *See Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F.3d 237, 242 (8th Cir. 1994). Thus, the first step in an equal protection case is determining whether the plaintiff has demonstrated that he was treated differently than others who were similarly situated to him. *See, e.g., Samaad v. City of Dallas*, 940 F.2d 925, 940-41 (5th Cir. 1991). Absent a threshold showing that he is similarly situated to those who allegedly receive favorable treatment, the Petitioners cannot have a viable equal protection claim. *See id.* at 941.

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[2] Notably, the Petitioners seek to raise their equal protection claim as members of an entirely artificial and self-created class of "alleged" victims. Of course, anyone can be an alleged victim, merely by saying that they are one.

The Petitioners argue that Petitioner H.P. belongs to a class of victims who are disfavored by the selective prosecutorial policy alleged in the Complaint, which allegedly *treats* the complaints of alleged incest victims such as H.P. less seriously than other alleged sexual assaults. Petition for Writ of Certiorari, p. 10. Of course, the Petitioners contend that the alleged assault of H.P. was treated less seriously by the prosecutors and the County precisely because the alleged perpetrator, Chad Belt, was not prosecuted. In short, despite the Petitioners' semantical attempts to couch the matter differently, the discriminatory or unequal "treatment" the Petitioners allege is the non-prosecution of the alleged offender.

The Petitioners, of course, do not cite any cases standing for the proposition that the non-prosecution of a third party constitutes "treatment" of the alleged victim for equal protection purposes and neither undersigned counsel nor the District Court nor the Court of Appeals could find any such cases. Instead, the cases uniformly hold that the prosecution or non-prosecution of an alleged criminal does not constitute "treatment" of any other person (other than the criminal defendant, of course), such that no individual can suffer a legally cognizable injury by virtue of the prosecution or non-prosecution of a third party. *See Younger v. Harris*, 401 U.S. 37, 42 (1971); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Poe v. Ullman*, 367 U.S. 497, 501 (1961); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("in American jurisprudence at least, a private citizen lacks a judicially cognizable

interest in the prosecution or nonprosecution of another"); *Oliver v. Collins,* 904 F.2d 278, 281 (5th Cir. 1991); *Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) ("[t]here is, of course, no such right [for a victim to have an alleged criminal prosecuted]"); *Sellner v. Panagoulis*, 565 F.Supp. 238, 250 (D.Md. 1982) ("[t]his Court does not know of any right afforded . . . to private persons to compel a state to prosecute criminal activity"), *cert. denied*, 479 U.S. 1069; *Rial v. Burmila,* 782 F.Supp. 1291 (N.D.Ill. 1992); *Johnson v. Craft,* 673 F.Supp. 191, 193 (S.D.Miss. 1987) (complaint by victim of assault alleging conspiracy to prevent prosecution of perpetrators dismissed). This is true even where the person seeking the prosecution was the victim of a criminal offense committed by the other. *Sattler,* 857 F.2d at 227; *Oliver,* 904 F.2d at 281.

In the end, no case has ever held that the prosecution or non-prosecution of an alleged criminal offender constitutes "treatment" of a third party to the criminal proceeding, including the alleged victim, under the Equal Protection Clause. In fact, the courts have uniformly held exactly the opposite. Accordingly, since the Petitioners cannot prove that *they* were subject to any "treatment" by the Respondents, they lack standing as a matter of law and their equal protection claim necessarily fails. As such, the Judgments of the District Court and the Court of Appeals should be affirmed.

II. The Court of Appeals' holding that the Petitioners had no standing to pursue an equal protection claim against the Respondents is not contrary to the precedents of this Court and does not create a circuit split because the "selective prosecution" cases cited by the Petitioners do not allow a suit by any person to compel the prosecution of a third party by the state since "selective prosecution" cases (1) must be brought by the criminal defendant and (2) must concern the prosecution of the criminal defendant.

The Petitioners cite a line of cases, commonly referred to as "selective prosecution" cases, in an attempt to overcome the Court of Appeals' holding that the Petitioners have no standing to pursue their Constitutional claims against the Respondents. The Petitioners argue that the allegations in the instant case are indistinguishable from those in the selective prosecution cases and that their claims are as justiciable as those claims. Contrary to the Petitioners' arguments, however, this case is distinguishable from the selective prosecution cases, primarily because of the parties bringing the action. In short, the Petitioners in this case were neither prosecuted nor had the law enforced against them, "selectively" or otherwise.

The four cases cited in the Petition for a Writ of Certiorari are plainly distinguishable from the instant case for at least two reasons. First there is a

plain distinction with regard to the identities of the plaintiffs. In the four cases cited in the Petition, *U.S. v. Frazier*, 408 F.3d 1102 (8th Cir. 2005); *U.S. v. Leathers*, 354 F.3d 955 (8th Cir. 2004), *rehearing and rehearing en banc denied, cert. denied*, 543 U.S. 844 (2004); *U.S. v. Batchelder*, 442 U.S. 114 (1979); and *U.S. v. Armstrong*, 517 U.S. 456 (1962), the civil plaintiffs were the criminal defendants themselves, objecting to their own prosecution, not the prosecution or non-prosecution of a third party. In fact, the Eighth Circuit Court of Appeals made this point clear in the *Leathers* case when it set forth the elements of a "selection prosecution" case as requiring a plaintiff to show "1) that he [not a third party] has been singled out for prosecution while others similarly situated have not been prosecuted for similar conduct and 2) that the government's action in thus singling him [not a third party] out was based on an impermissible motive such as race, religion, or the exercise of constitutional rights." *Leathers,* 354 F.3d at 963 (quoting *U.S. v. Parham,* 16 F.3d 844, 846 (8th Cir. 1994)). In the end, the Petition rebuts a false argument not made by the Respondents, the District Court, or the Court of Appeals. The Respondents do not dispute that claims for "selective prosecution" can be successfully pursued under the Equal Protection Clause, just that such claims can only be pursued by those with a legally cognizable interest in the subject prosecution (i.e., the criminal defendant), otherwise known as standing.

In addition to the distinction as to the parties making the claims, the four criminal cases cited in the Petition also deal with a different subject matter. Specifically, the criminal cases cited by the Petitioner deal with the prosecution of a criminal defendant, not the non-prosecution of a criminal suspect, as is the issue in this case. This distinction is important because it reveals an overwhelming absence of support for the Petitioners' position. Specifically, the undersigned has been unable to find any case (neither the Petitioners nor the District Court nor the Court of Appeals ever cited such a case) in which a civil plaintiff has ever withstood a standing challenge or otherwise successfully pursued a civil claim contesting the non-prosecution of any person.[3] This complete dearth of cases can lead to only one conclusion, namely, that no individual suffers legally cognizable injury due to the criminal non-prosecution of any individual, including both the alleged offender and the alleged victim (the victim because he has no cognizable interest regardless of the prosecutorial decision and the offender because he cannot and

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[3] In making this statement, the Separate Respondent is not attempting to minimize or dispute the core holdings of the "selective prosecution" line of cases cited in the Petition (i.e, that criminal defendants may sue under the Equal Protection Clause where they assert that their prosecution was "unequal"). Instead, the Respondent merely contends that such actions actually contest the prosecution of the civil plaintiff rather than the non-prosecution of some third party.

would not claim injury as a result of "unequal" prosecution where he is not prosecuted).

In the end, the distinctions between the "selective prosecution" line of cases cited by Petitioners and the novel "selective non-prosecution" theory advanced by the Petitioners serve to reveal the Petitioners' lack of a legally cognizable interest in the non-prosecution of H.P.'s alleged assailant. Because the Petitioners lack standing and no case of this Court or of the Courts of Appeals has ever held differently, the Petition for a Writ of Certiorari should be denied.

III. The Court of Appeals' holding that the Petitioners had no standing to pursue an equal protection claim against the Respondents is not contrary to the precedents of this Court and does not create a circuit split because the "selective enforcement" cases cited by the Petitioners do not allow a suit by any person to compel the prosecution of a third party by the state since "selective enforcement" cases prohibit only the unequal denial of police "protective services" to complainants by local police agencies and have nothing to do with state prosecutorial functions.

The Petitioners also cite a line of cases commonly referred to as "selective enforcement" cases. These selective enforcement cases generally stand for the proposition that police may not ignore complaints and/or provide protective services in an unequal

manner to similarly situated citizens. For instance, in *Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000), the Ninth Circuit Court of Appeals held that a decedent's family could proceed to trial on their section 1983 claim against the local police where the family had offered some evidence that the police had refused their protective services to the decedent because she was a member of a disfavored class of citizens. Similarly, in *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998), the Second Circuit Court of Appeals affirmed a jury verdict against the local police where the evidence showed that the police followed a policy of investigating the first complaint, but never the second complaint, with regard to any particular incident, thereby providing unequal treatment to similarly situated complainants. In *Thurman v. City of Torrington*, 595 F.Supp. 1521 (D.Conn. 1984), the District Court for the District of Connecticut affirmed the denial of a city police department's motion to dismiss where the Plaintiff made allegations that, while police protection was fully provided to persons assaulted by strangers, the police consistently afforded lesser protection where, as the Plaintiff asserted in her case, the victim was assaulted by a relative or boyfriend. The Petitioners accurately summarize the holdings of these cases by reciting the words of this Honorable Court, as quoted by the Eighth Circuit Court of Appeals, that "the state may not 'selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.'" Petition for a Writ of Certiorari, p. 17 (quoting *Freeman v. Ferguson*, 911

F.2d 52, 55 (8th Cir. 1990) (quoting *Deshaney v. Winnebago County Dept. Of Social Services*, 489 U.S. 189, 197 109 S.Ct. 998, 1004 n. 3 103 L.Ed.2d 249, 259 (1989)).

The principal problem with the Petitioners' citation of the "selective enforcement" line of cases is that those cases have nothing to do with this case. The selective enforcement cases prohibit the denial of police "protective services" to disfavored minorities, however, the Petitioners in this case have not alleged that they were denied any protective services, but that they were denied the prosecution of their alleged assailant. Prosecution of a criminal offender, however, is not a "protective service" provided to other citizens by the police. As the District Court correctly noted in its Opinion, "[c]ollateral individuals to [a criminal] proceeding . . . have not suffered an Article III direct injury sufficient to invoke a federal court's jurisdiction to rule on their claim because crime is not prosecuted for the benefit of the victimized; crime is prosecuted on behalf of the state in the collective interest of the public." *See* Appendix to Petition, p. 29a (quoting *U.S. v. Grundhoefer*, 916 F.2d 788, 791 (2d Cir. 1990)).

In the end, the selective enforcement cases, like the other cases cited by the Petitioners, fail to overcome the fact that the Petitioners have no judicially cognizable interest in the prosecution of non-prosecution of a third party. This fact remains no matter how the Petitioners attempt to couch their allegations and precludes the Petitioners' claim(s) as

a matter of law. Accordingly, since there are no cases in conflict with the Judgment of the Court of Appeals herein, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Sebastian County, Arkansas,
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